



October 29, 2021

BY ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street, N.E.
Washington, DC 20554

Re: *WT Docket No. 20-443; GN Docket No. 17-183*

Dear Ms. Dortch:

The Commission issued a *Notice of Proposed Rulemaking* (“NPRM”) in January that unanimously rejected efforts by RS Access, LLC (“RS Access”), DISH Network (“DISH”), and other Multichannel Video and Data Distribution Service (“MVDDS”) licensees to evict next-generation satellite operators from the 12.2-12.7 GHz band (the “12 GHz Band”) so that this valuable spectrum could be handed over to those same MVDDS licensees. Given the insufficient notice in this docket, any effort to move straight to an order at this stage would clearly be both arbitrary and capricious.

The Commission made clear that any changes to operations in the band would have to be made “without causing harmful interference to incumbent licensees,” including non-geostationary orbit (“NGSO”) satellite operators.¹ Yet this was one of the only definitive statements made in the *NPRM*, which did not take any position on the complicated technical issues involved in creating a new high-power mobile service in the band or propose any actual rules for consideration. Given the current record, no party could claim to have any notice of what technical rules could possibly be included in an order that would protect incumbent satellite operations. Nonetheless, RS Access contends that merely asking a series of open-ended questions without making any proposals provides sufficient notice under the Administrative Procedure Act (“APA”) because any rules would somehow be a “logical outgrowth” of something mentioned in passing.² This argument misconceives both the purpose and application of the APA.

The D.C. Circuit has explained that “[t]he ‘logical outgrowth’ doctrine does not extend to a final rule that is a brand new rule, since ***‘[s]omething is not a logical outgrowth of nothing.’***”³ As discussed below, the APA requires more to support the adoption of new rules than the open-ended inquiry the Commission has issued here—especially considering the complex technical

¹ See *Expanding Flexible Use of the 12.2-12.7 GHz Band*, 36 FCC Rcd. 606, ¶ 2 (2021) (“*NPRM*”).

² See Letter from V. Noah Campbell to Marlene H. Dortch, WT Docket No. 20-443, at 3-4 (Oct. 19, 2021) (“RS Access Ex Parte”).

³ *Int’l Union, United Mine Workers of Am. v. Mine Safety and Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (second alteration in original) (emphasis added) (quoting *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994)).

issues involved and the harm RS Access intends to cause to consumers. Moreover, although RS Access continues its bizarre obsession with Space Exploration Holdings, LLC (“SpaceX”), the record is replete with parties raising the procedural shortcomings of the *NPRM* (including AT&T, Microsoft, and TechFreedom). Based on the state of the record, the Commission could not proceed further without issuing another notice to give interested parties sufficient information as to what it actually intends to do in this proceeding so that they can comment intelligently upon that proposal. In fact, the current record demonstrates that any new rules would almost certainly fail the test the Commission set in the *NPRM* to ensure a gift of new rights to RS Access cannot harm Americans using next-generation satellite services.

“The process of notice and comment rule-making is not to be an empty charade. It is to be a process of reasoned decision-making.”⁴ The D.C. Circuit has made clear the important function that providing adequate notice serves under the APA.

Notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.⁵

To realize these benefits and “meet the rulemaking requirements of section 553 of the APA, an agency ‘must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.’”⁶

The *NPRM* in this proceeding does not meet that standard—though this is not surprising. Until fairly recently, MVDDS operators acknowledged the fact that the operation of a high-power terrestrial mobile service in the 12 GHz Band would be fundamentally incompatible with an NGSO service in the band. Indeed, the petition that initiated this proceeding specifically proposed that “[t]he Commission should eliminate or render secondary the unused NGSO FSS allocation at 12.2-12.7 GHz,”⁷ and the technical studies submitted by MVDDS advocates confirmed the incompatibility of a mobile service in the 12 GHz Band and NGSO systems.⁸ Less than two years ago, DISH stated categorically that “concurrent sharing of spectrum between co-primary 5G and

⁴ *Conn. Light and Power Co. v. NRC*, 673 F.2d 525, 528 (D.C. Cir. 1982).

⁵ *United Mine Workers*, 407 F.3d at 1259 (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983)). See also *Conn. Light*, 673 F.2d at 530 (“If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency’s proposals. As a result, the agency may operate with a one-sided or mistaken picture of the issues at stake in a rule-making.”).

⁶ *Nat’l Lifeline Ass’n v. FCC*, 921 F.3d 1102, 1115 (D.C. Cir. 2019) (quoting *Fla. Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988)).

⁷ MVDDS 5G Coalition Petition for Rulemaking to Permit MVDDS Use of the 12.2-12.7 GHz Band for Two-Way Mobile Broadband Service, Docket No. RM-11768, at 22 (Apr. 26, 2016).

⁸ See, e.g., Tom Peters, *MVDDS 12.2-12.7 GHz Co-Primary Service Coexistence* 35 (June 8, 2016) (“coexistence between MVDDS 5G operations and NGSO FSS operations is not possible”), as attached to Comments of MVDDS 5G Coalition, Docket No. RM-11768, at Attachment I (June 8, 2016).

NGSO FSS operations is not viable in the 12 GHz Band.”⁹ Yet now that the Commission unanimously rejected DISH’s petition, DISH and RS Access try to claim that spectrum sharing is possible, requiring that they argue directly contrary to their prior submissions. It is little wonder that the *NPRM* cannot and does not provide any concrete details about how such sharing could be possible, including the operating constraints on terrestrial mobile systems that would make it so.

After the *NPRM* was issued, only one submission was made to support RS Access’s claims that a new mobile service could coexist in this band with ubiquitous satellite services. The deep flaws in this submission are well documented throughout the docket.¹⁰ To reach the submission’s unrealistically favorable conclusions, RS Access was forced to assume certain operational parameters and deployment scenarios. But even then, it did not propose any actual rules that would require mobile operators to comply with those expectations. Even the firm RS Access paid to make the submission explicitly denied that its assumptions should be considered proposals.¹¹ Moreover, as SpaceX has pointed out, even that flawed analysis concluded that tens of thousands of NGSO customers would be affected by a terrestrial mobile service operating in the 12 GHz Band and argued that this level of interference would not be an acceptable outcome.¹² In response, DISH stated that it considers harming tens of thousands of broadband users to be a “miniscule” concern and urged the Commission to ignore these American consumers.¹³ Unfortunately, as in many other areas, the *NPRM* does not give any indication of what the Commission would consider to be an impermissible level of “harmful interference to incumbent licensees” for purposes of this proceeding. Without such basic information it is unreasonable to expect the sort of insightful and diverse public comment the APA is designed to elicit to benefit the Commission’s consideration.

RS Access cites the C-band proceeding in support of its contention that the *NPRM* in this proceeding provides sufficient notice.¹⁴ Yet the notice in the C-band proceeding included eleven pages of proposed rules covering everything from power limits, emission limits, and power flux-density limits to licensing provisions.¹⁵ Even then, the Commission issued two further notices seeking “focused additional comment” on specific proposals in the record to ensure that it had robust input on salient issues from all interested parties.¹⁶ Far from supporting RS Access’s

⁹ Letter from Alison Minea to Marlene H. Dortch, IBFS File No. SAT-MOD-20180319-00022 and Docket No. RM-11768, at 3 (Dec. 2, 2019).

¹⁰ See, e.g., Letter from David Goldman to Marlene H. Dortch, WT Docket No. 20-443 and GN Docket No. 17-183, at 1-2 & nn.4-5 (Sept. 27, 2021) (“SpaceX Ex Parte”) (listing submissions challenging report submitted by RS Access).

¹¹ See Letter from David Marshack to Marlene H. Dortch, WT Docket No. 20-443, at 11 (Aug. 9, 2021) (arguing that the *NPRM* never asked for proposed rules).

¹² See SpaceX Ex Parte at 7.

¹³ See Letter from Pantelis Michalopoulos to Marlene Dortch, WT Docket No. 20-443, at 1, 6-7 (Aug. 30, 2021).

¹⁴ See RS Access Ex Parte at 4.

¹⁵ See *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, 33 FCC Rcd. 6915, Appendix A (2018).

¹⁶ See Public Notice, *International Bureau and Wireless Telecommunications Bureau Seek Focused Additional Comment in 3.7-4.2 GHz Band Proceeding*, 34 FCC Rcd. 2904 (IB/WTB 2019); Public Notice, *Wireless Telecommunications Bureau, International Bureau, Office of Engineering and Technology, and Office of Economics and Analytics Seek Focused Additional Comment in 3.7-4.2 GHz Band Proceeding*, 34 FCC Rcd. 6208 (WTB/IB/OET/OEA 2019).

argument, the C-band proceeding provides a stark contrast highlighting the deficiencies of the current record.

Lastly, as much as RS Access would like to create the impression that SpaceX is the only party opposing the MVDDS operators' attempted spectrum grab, the fact is that a diverse group of over forty independent parties has opposed the DISH/RS Access proposals as documented in Attachment A hereto. This widespread opposition includes those who have pointed out the lack of notice provided by the *NPRM*, such as AT&T, Microsoft, and TechFreedom.¹⁷ The Commission cannot ignore this well-reasoned and fundamental objection despite the wishes of the MVDDS operators.

The record in this proceeding still leaves much to the imagination. No party—including RS Access and DISH—has proposed any rules they believe would protect existing licensees in the 12 GHz Band for consideration by interested parties. As the D.C. Circuit has held, “[s]omething is not a logical outgrowth of nothing.”¹⁸ Especially given the highly technical nature of the spectrum sharing issues involved, proposed operating rules are a minimum requirement for targeted comment that can support reasoned decision making. As the record currently stands, however, the Commission cannot proceed to adopt any decisions without first promulgating a further notice that alerts all parties to the actual proposals on the table for consideration.

Sincerely,

/s/ David Goldman

David Goldman
Director of Satellite Policy

SPACE EXPLORATION TECHNOLOGIES CORP.
1155 F Street, NW
Suite 475
Washington, DC 20004
Tel: 202-649-2691
Email: David.Goldman@spacex.com

Attachment

¹⁷ See Reply Comments of AT&T Services, Inc., WT Docket No. 20-443, GN Docket No. 17-183, and Docket No. RM-11768, at 34-35 (July 7, 2021); Reply Comments of Microsoft Corporation, WT Docket No. 20-443 and GN Docket No. 17-183, at 5-7 (July 7, 2021); Comments of TechFreedom, WT Docket No. 20-443, at 2-5 (May 7, 2021).

¹⁸ *United Mine Workers*, 407 F.3d at 1259 (alteration in original) (citation omitted).

EXHIBIT A

Organizations Filing in Opposition to MVDDS “Coalition” Effort to Change 12 GHz Spectrum Rules

Diverse Coalition of Public Interest Organizations, Industry, and Local Groups Support Current Satellite Operations in 12 GHz Band as Highest and Best Use of the Spectrum; Key to Bridging the Digital Divide

More than 40 separate organizations have filed comments opposed to expanding MVDDS use of 12 GHz for 5G mobile services, arguing that existing and innovative satellite use of the band is critical to reducing the digital divide. The below organizations filed formal comments to the Federal Communications Commission in response to the MVDDS 5G Coalition's petition for rulemaking and proposed rulemaking (NPRM) regarding the use of the 12.2-12.7 GHz band for speculative two-way mobile broadband service.

**Alaska Federation of Natives
Alaska Technologies
American Consumer Institute
Americans for Tax Reform
Appalachian Council for Innovation
Association for Competitive Technology (ACT)
AT&T
The Boeing Company
Center for Freedom and Prosperity
Center for Individual Freedom
Commercial Spaceflight Federation
The Committee for Justice
Connect Americans Now
Connected Nation
Consolidated Electric Cooperative
Consumer Action for a Strong Economy
Citizens Against Government Waste
Digital Liberty
DroneSense
FreedomWorks
Friday Institute for Educational Innovation, NC State University
Gigabit Libraries Network**

**Google
Hoh Indian Tribe
Intelsat
JobsOhio
Kepler
Maine State Senator Trey Stewart
Microsoft
Mississippi State Senator Scott Delano
National Grange on the Order of Patrons of Husbandry
National Rural Education Association
National Taxpayers Union
National Veteran Small Business Coalition
OneWeb
Santiam Canyon School District, Oregon
SES
Space Exploration Technologies (SpaceX)
Skyhook Solar
TechFreedom
USTelecom
U.S. Chamber of Commerce, Technology Engagement Center (TEC)
60 Plus Association**

Filing Links and Quotations

[Alaska Federation of Natives](#), Julie Kitka

- "With increased connectivity in our rural villages, we would have a greater opportunity to build a better future for our children. We would be able to expand telemedicine and access to health care; expand educational opportunities; design new ways government services can be delivered and explore economic opportunities"

[Alaska Technologies](#), John Wallace

- "The 12.2-12.7 band needs to be preserved in [its] present state. From what I understand, present fixed terrestrial licensees have had many years to provide service to our people, but have not done so. Present terrestrial licensees have been sitting on their licenses and not doing anything with them. Now that LEO providers are using the band as was designed, they are asking for changes that will do nothing but cause harm to LEO providers that are actually committed to service"

[American Consumer Institute](#), Steve Pociask/Krisztina Pusok; [Americans for Tax Reform](#), Katie McAuliffe; [Center for Individual Freedom](#), Jeffery Mazzella; [Center for Freedom and Prosperity](#), Andrew F. Quinlan; [The Committee for Justice](#), Ashley Baker; [Consumer Action for a Strong Economy](#), Matthew Kandrach; [Digital Liberty](#), Katie McAuliffe; [FreedomWorks](#), Jason Pye; [National Taxpayers Union](#), Andrew Lautz/Brandon Arnold; [60 Plus Association](#), James L. Martin/Saul Anuzis

- "The Petitioners are requesting a rulemaking that not only would allow them to provide two-way mobile service, but it would also eliminate critical interference protections for NGSO systems using the band. In other words, if adopted, the proposed rule changes would adversely impact broadband access and limit competition"

[Appalachian Council for Innovation](#), Donald Purdie

- "Next-generation satellite systems like Starlink are focused on communities like ours that have few options. Taking the spectrum away from satellite broadband to re-allocate to companies who have repeatedly failed to deploy would not serve our interests or help close the digital divide"

[Association for Competitive Technology \(ACT\)](#), Brian Scarpelli and Belen Crisp

- "New Non-Geostationary Satellite Orbit (NGSO) constellations are poised to connect unserved populations across America, particularly in rural, urban, and remote areas that are underserved. The Petitioners' proposed rule changes would adversely impact them and would represent a step backward in closing the digital divide"

[AT&T](#), Michael P. Goggin

- "It is well-established that although the one-way services currently permitted under MVDDS licenses may coexist with DBS (subject to extensive pre-deployment coordination), two-way services would create an untenable interference environment. It is for this reason that the Commission restricted MVDDS to low-power, one-way, fixed use in the first place"

[The Boeing Company](#), Bruce A. Olcott

- "MVDDS proponents alternatively claim that terrestrial mobile services can share the 12 GHz band with DBS and NGSO FSS systems, a position that lacks technical support and directly conflicts with their prior representations on this issue"

[Commercial Spaceflight Federation](#), Karina Drees

- "Were the Commission to move forward with an NPRM, it would significantly undercut investment in next-generation satellite technology, inject enormous regulatory uncertainty as these systems are being deployed, and call into question the meaning of Commission authorizations"

Connect Americans Now, Richard T. Cullen

- "As we understand it, the proposed rulemaking in circulation would hinder the deployment of LEOs and undermine major investments that have already been made in this technology as a key tool to expand broadband service and competition"

Connected Nation, Brent Legg

- "Low Earth Orbit (LEO) satellite technology has the potential to finally deliver broadband speeds to some of our most remote rural homes and businesses. The 12 GHz band, as it currently stands, holds critical spectrum resources for LEO satellite broadband applications"

Consolidated Electric Cooperative, Lynn Thompson

- "Our service territory in central Missouri needs broadband options"

Citizens Against Government Waste, Thomas A. Schatz

- "Considering the technological advancements currently being developed and deployed, the FCC must maintain stringent oversight of the band and ensure that incumbent Non-Geostationary Satellite Orbit and Direct Broadcast Service satellite users of the band can continue to deploy satellites that increase communications capabilities that can also be leveraged for satellite-based broadband services to rural communities"

DroneSense, Chris Eyhorn

- "The Petitioners' proposed rule changes could adversely impact our shared goal of enabling first responder access to mobile broadband services as well as the Commission's progress on closing the digital divide, by reducing needed interference protections and limiting competitive broadband options"

Friday Institute for Educational Innovation, NC State, Ray Zeisz

- "it is imperative the Commission build and expand on positive momentum to maximize investments and innovations which will bring broadband coverage to all Americans, especially students in unserved rural areas hit hard by the shift to remote learning. That is why we write today; to encourage the [Commission] to oppose proposed changes regarding two-way mobile operations in the 12 GHz band which would undermine significant investments being made in Low Earth Orbit satellites as a broadband solution"

Gigabit Libraries Network, Don Means

- "GLN entered into an agreement with SpaceX (Starlink) to outfit several small rural public libraries as 'beta enterprise' users of its low earth orbit (LEO) satellite broadband system...Implementation of this LEO technology appears to be yielding faster connection speeds with lower latency than traditional geostationary satellite based services"

Google, Megan Anne Stull

- "the 12 GHz band appears to be a poor candidate for supporting terrestrial mobile broadband at this time, due to coexistence challenges between terrestrial 5G mobile systems and FSS terminals"

Hoh Indian Tribe, Dawn Gomez

- "because of Starlink, our community finally has broadband, distributed to our community in only a matter [of] weeks. This has enabled our children to participate in distance learning during the pandemic, obtain telehealth services, and connect our businesses to online services, among other things—for the first time"

Intelsat, Ray Rutngamlug and Cynthia J. Grady

- "adding terrestrial Mobile to the 12.2-12.7 GHz frequency band...would cause interference to incumbent operations, jeopardize Direct Broadcast Satellite...services to millions of end users, and devalue incumbents' investments"

JobsOhio, J.P. Nauseef

- "JobsOhio opposes the creation of a new terrestrial Mobile allocation in the 12 GHz band because current incumbents already make efficient use the spectrum, are making dramatic strides to bridge the digital broadband divide in the immediate future, and because new terrestrial operations pursuant to such an allocation will create harmful interference for incumbents"

Kepler Communications, Nickolas G. Spina

- "any modifications to the 12 GHz band would undermine active services of NGS0 FSS operators in providing service to underserved and unserved areas. Meanwhile, despite having been granted ample amounts of spectrum, MVDDS licensees have failed to make use of their current allocations and demonstrate any substantial benefit provided to the public"

Maine State Senator Trey Stewart

- "Maine ranks among the 10 worst states in the country for internet coverage. Being a rural state with poor broadband access created a serious challenge for businesses, students, and people simply trying to do their job from home when the pandemic hit. Fortunately, some areas negatively impacted by the lack of accessible broadband have since been able to connect through next-generation satellite systems"

Microsoft Corporation, Paula Boyd

- "satellite-based broadband is an additional tool to provide broadband connectivity for Americans in unserved and underserved areas. Realizing greater 5G benefits can and should be accomplished in alternative ways without jeopardizing the benefits that derive from satellite space-to-earth operations in the 12 GHz band"

Mississippi State Senator Scott Delano

- "We encourage the Commission to reject the speculative attempts to upend the well-established and well-balanced spectrum sharing rules that are today the hallmark of the 12 GHz band"

National Grange on the Order of Patrons of Husbandry, Betsy Huber

- "We urge the Commission to consider the fact that changing the rules now would utterly disrupt U.S. NGS0 systems and undermine significant investment and innovation directed at expanding broadband service. Remote and rural areas where 5G is out of reach are relying on these systems to move forward and expand access to broadband"

National Rural Education Association, Allen Pratt

- "we respectfully request that the FCC deny the Multichannel Video and Data Distribution Service (MVDDS) petition for a Notice of Proposed Rulemaking (NPRM) on two-way mobile use of the 12GHz band. This move would have a negative impact on the expansion of broadband service in rural areas and in rural school systems"

National Veteran Small Business Coalition, Scott S. Jensen

- "LEO satellite technology will help expand broadband connectivity for veterans and small business owners, especially in rural areas. It also holds great promise as a solution to increase competition and choice in other areas. We must continue to encourage investment in this innovative technology that is critical for bringing broadband connectivity and competition to unserved and underserved Americans"

OneWeb, Eric Graham

- "Arguments in support of introducing a terrestrial mobile allocation into a spectrum band with comparatively poor terrestrial propagation characteristics ignore the fact that such an allocation would only serve consumers who currently have many terrestrial mobile options in the areas where they live, work, and play"

Santiam Canyon School District, Oregon, Todd Miller

- "this service proved essential for us after Beachie Creek wildfires ripped through our canyon, devastating homes and infrastructure. For a while, [LEO satellite] technology was the only way our school district was able to communicate with staff, students and families"

SES, Petra A. Vorwig

- "Satellite operators have shown they can and will commit the necessary resources to build an infrastructure that supplies valuable services to urban and rural communities alike. Preserving the integrity of those services requires limiting interference from terrestrial sources, as the Commission did when it established the MVDDS operating framework"

Space Exploration Technologies (SpaceX), David Goldman

- "MVDDS licensees have claimed that they can be given new rights 'without harming other existing incumbent operations that have co-primary status in the band.' The Commission should dismiss the petition if the MVDDS licensees and those that they have funded or otherwise support are unable to produce indisputable technical evidence to back up that claim"

Skyhook Solar, Kendra Joseph

- "Many of our homes, businesses, and communities have traditionally had no access to reliable broadband, in Woody Creek, CO. There are no options for fiber or cable and the traditional satellite services offer intermittent service with such a high latency that working from home is impossible. Fortunately, next-generation satellites systems using the 12 GHz band are improving our access to broadband"

TechFreedom, Jim Dunston

- "the FCC would have to modify NGSO licenses to require them to suffer debilitating interference from mobile terrestrial users. The loss of the 12 GHz spectrum will no doubt limit overall data throughput on NGSO systems"

USTelecom, Patrick R. Halley

- "the record is clear that in fact two-way mobile broadband service in the 12 GHz band simply cannot coexist with NGSO or DBS service and proponents of allocating the band have not offered a proposal that proves otherwise"